IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-785

CERTAIN UNINDICTED INDIVIDUALS
AND CORPORATIONS,
Petitioners

v.

UNITED STATES OF AMERICA,
COMMONWEALTH OF VIRGINIA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

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QUESTION PRESENTED

Whether Section 4F(b) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 requires a state attorney general to show a "compelling and particularized need" when he moves for disclosure of federal grand jury materials.

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STATUTES

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The Commonwealth of Virginia, respondent herein, respectfully requests that this Court deny the petition for writ of certiorari.

STATUTES AND RULES INVOLVED

United States Code, Title 15:

§ 15f. Actions by Attorney General

(b) To assist a State attorney general in evaluating the notice or in bringing any action under Sections 12 to 27 of this title, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under Sections 12 to 27 of this title.

Federal Rules of Criminal Procedure, Rule 6(e)(3)(C).

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

STATEMENT OF THE CASE

In 1977 a federal grand jury was impanelled in the Eastern District of Virginia to conduct an investigation into price fixing activities by automobile dealerships and the Tidewater Automobile Dealers Association (TADA). The grand jury indicted seven dealerships and TADA charging them with conspiracy to fix the labor rates on automobile body repair work. All defendants entered pleas of *nolo contendere*. The court accepted those pleas and fined the defendants.

The Attorney General of Virginia filed a request with the United States Attorney General, pursuant to Section 4F(b) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15f(b), [hereinafter 4F(b)] for all "investigative files or other materials" relating to the price fixing conspiracy charged in the indictments. The Department of Justice agreed that the Commonwealth was entitled to the materials, but stated that a court order was necessary before it could release them. The Commonwealth and the United States jointly moved for disclosure of the grand jury materials and requested a protective order limiting the Commonwealth's use of the materials to the investigation and prosecution of civil antitrust actions. Any disclosure beyond the stated use was to remain strictly prohibited.

The district court rejected the argument of the Commonwealth and the United States that 4F(b) of the Clayton Act was meant to apply to Rule 6(e) of the Federal Rules of Criminal Procedure and denied the joint motion for disclosure. Access was denied to all of the grand jury materials and to the bills of particulars.

From the district court's denial of relief the Commonwealth and the United States appealed to the Fourth Circuit. After full briefing and argument by all parties, including the unindicted parties, the Fourth Circuit remanded the case to the district court with instructions to reconsider in light of the standards set forth in its opinion of August 12, 1980.

The standards adopted by the Court of Appeals removed from the Attorney General of Virginia the requirement that a "particularized need" be shown as a prerequisite to disclosure of federal grand jury materials. The burden of opposing disclosure was placed on the parties seeking to deny disclosure to the Attorney General, and the Court of Appeals did not differentiate indicted from unindicted parties. A writ of certiorari is now sought by an unidentified group of automobile dealers who appeared before the grand jury but were not indicted.

REASONS FOR DENYING THE WRIT

I.

THE FOURTH CIRCUIT'S ANALYSIS OF THE DISCLOSURE STANDARD APPLICABLE TO A STATE ATTORNEY GENERAL IS CONSISTENT WITH THE PRIOR HOLDINGS OF THIS COURT.

The Fourth Circuit held that Congress, by means of 4F(b), has relieved the state attorney general of the requirement of establishing "particularized need" as a threshold condition to disclosure of grand jury materials. In their effort to persuade this Court to exercise its jurisdiction, petitioners suggest that the decision below is in conflict with prior Supreme Court decisions. Two cases, *Douglas Oil Co. of California* v. *Petrol Stops Northwest,* 441 U.S. 211 (1979), and *United States* v. *Proctor & Gamble Co.,* 356 U.S. 677 (1958), are characterized by petitioners as controlling precedents ignored by the Fourth Circuit in the case at bar. To the contrary, neither case examined the point of law which has been raised by the Commonwealth of Virginia's request for grand jury materials.

Douglas Oil involved the efforts of a private, non-governmental antitrust plaintiff to gain access to grand jury transcripts developed during a Department of Justice investigation. Justice Powell, writing for the majority, pointedly limited the issues before the Court: "This case presents . . . questions concerning a civil litigant's right to obtain transcripts of federal criminal grand jury proceedings . . . [W]hat justification for disclosure must a *private party* show in order to overcome the presumption of grand jury secrecy applicable to such transcripts?" 441 U.S. at 213. [Footnotes omitted, emphasis added]. The Court also limited its holding to the precise facts of the case, reemphasizing the private status of the plaintiff. *Id.* at 223.

The second case relied on by petitioners, *Proctor & Gamble,* is similarly inapplicable to the present situation. In that case, a private defendant was the subject of a Department of Justice grand jury investigation. The grand jury failed to return an indictment, and the Department of Justice chose to pursue a civil antitrust suit against the defendant. The defendant moved, pursuant to Fed. R. Civ. P. 34, for production and discovery of grand jury materials. The district court ordered the government to produce the grand jury transcripts. This Court reversed, finding that the defendant had failed to make a sufficient showing of "good cause" under Rule 34.

As in *Douglas Oil,* the party moving for production of grand jury materials in *Proctor & Gamble* was a private litigant. Neither opinion addresses the congressionally recognized relationship between federal and state antitrust enforcement officers or the effect which the passage of 4F(b) was intended to have on the construction of Rule 6(e).

Pervasive throughout Title III of the Hart-Scott-Rodino Act is the clear recognition by Congress that criminal investigations and prosecutions by the United States *must* be accompanied by civil enforcement actions for treble damages by the states, through sections 4 and 4C of the Clayton Act, in order to effectuate the policies of the antitrust laws. *See* H.R. Rep. No. 94-499, 94th Cong., 2nd Sess. 4 (1975), reprinted in 1976 U.S. Code Cong. & Admin. News at 2572, 2573-4. *See also* Sherman, *The Law of Antitrust* 770 (1977) ("[T]here can be little doubt that private [treble damage] actions are a major part of the nation's antitrust enforcement program."); Posner, *Antitrust Law* 227-32 (1976). To this end, the attorneys general of the several states were given the right to bring a *parens patriae* action on behalf of state residents damaged by violations of the federal antitrust laws. 15 U.S.C. § 15c. In addition, state attorneys general were given a right of access to federal investigative materials through § 4F(b) of the Clayton Act. Congress recognized that the enforcement responsibilities vested in the states by the Hart-Scott-Rodino Act can only be

fulfulled if the states are able to benefit from materials developed in federal investigations. The standard adopted by the Fourth Circuit to regulate the disclosure process recognizes the needs of innocent parties while eliminating barriers which impede state access to federal grand jury materials.

The legislative history specifically involving 4F(b) is sparse. This section was proposed by the House of Representatives, consequently the written House Report is the best-reasoned exposition of the purpose of the section. The House Report dealt with an earlier version of § 4F which applied only to *parens patriae* actions.[1] It states:

SECTION 4F

> Section 4F promotes *parens patriae* actions as a major aspect of antitrust enforcement by *encouraging Federal-State cooperation* . . . . *Whenever* a State attorney general so requests, in order to evaluate the notice from the U.S. Attorney General or in order to bring a *parens patriae* action, *section 4F(b) requires* the U.S. Attorney General to make the Justice Department's investigative files available to the State attorneys general 'to the extent permitted by law.' This means that *the files are to be made available except where specifically prohibited.*
>
> *Section 4F(b) reflects the Committee's desire that the Federal Government cooperate fully with the State antitrust enforcers.*
>
> *The benefits of increases in Federal-State cooperation* and coordination of antitrust enforcement *are obvious,* and are achieved in H.R. 8532 without the expenditure of additional Federal funds.

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[1] Section 4F was eventually expanded to cover actions brought under either section 4 *or* 4C. This expansion reflects the desire of Congress to make available to the States *all* information "except where *specifically* prohibited."

H.R. Rep. No. 94-499, 94th Cong., 2nd Sess. 17 (1975), reprinted in 1976 U.S. Code Cong. & Admin. News at 2586-7. [Emphasis added].

The district court relied heavily on remarks made by Senator Abourezk during a heated floor debate to conclude that the state attorney general could not have access to grand jury materials unless Rule 6(e) standards were met. The Fourth Circuit concluded that the Senator's remarks meant only that under Fed. R. Crim. P. 6(e), the Attorney General could not *voluntarily* turn over such materials to a state attorney general. Opinion of the Fourth Circuit (Pet., p. A6-7). Nonetheless, disclosure "under existing law" may be authorized by the court under the circumstances outlined in Fed. R. Crim. P. 6(e)(3). *Id.*

Thus having analyzed Rule 6(e) in the context of 4F(b), the Fourth Circuit held:

> When Congress has thus explicitly stated the legitimate and proper need of the State attorney general for the disclosure of such materials, it has resolved the public interests consideration in such a case and, in so doing, it accordingly relieved that official of the requirement of establishing a "particularized need" as a threshold condition to disclosure.

Opinion of the Fourth Circuit (Pet., p. A12). The court analogized its special treatment of state attorneys general under 4F(b) to the treatment of government attorneys under Rule 6(e)(3). Neither situation requires a showing of particularized need. Opinion of the Fourth Circuit (Pet., p. A12 n. 21). The Fourth Circuit's determination, therefore in no way conflicts with either the law or policies underlying the *Proctor & Gamble* and *Petrol Stops* decisions.

II.

THERE IS NO CONFLICT BETWEEN THE CIRCUIT COURTS WHICH HAVE ADDRESSED THE ISSUE IN THIS CASE.

Two Courts of Appeals have addressed the issue presented in this case. Both the Court below and the Court of Appeals for the Ninth Circuit have determined that 4F(b) removes the burden of showing a particularized need from the State Attorney General who seeks access to grand jury materials.

In *United States v. B.F. Goodrich,* 619 F.2d 798 (9th Cir. 1980), the Ninth Circuit determined that "(T)he need for access to grand jury materials is greater for States than for ordinary individuals because of the important place State Attorneys General occupy in Congress' scheme for antitrust enforcement." 619 F.2d 798, 801. The Court held that 4F(b) "impliedly directs the Attorney General of the United States to disclose grand jury materials to State Attorneys General without the showing of particularized and compelling need which is normally required by Rule 6(e)." *Id.* This approach accommodates the special interest of state attorneys general, while recognizing the need for continued district court discretion pursuant to Rule 6(e).

In the opinion below, the Fourth Circuit amplified the result reached by the 9th Circuit in *B.F. Goodrich.* Judge Russell thoroughly examined the legislative history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. The Court then reviewed the manner in which federal courts have treated Rule 6(e), taking into account the relevant decisions of this Court. The holding of the Fourth Circuit is a precise, internally consistent, and well-reasoned accommodation of the policies underlying both Rule 6(e) and 4F(b):

> We hold only that, first, grand jury materials are "investigative files" within the intent of § 15f(b), 15 U.S.C., and, secondly, that the State Attorney General, in his *parens patriae* capacity, has been relieved by Congress of the initial burden of showing a "particularized need" as a basis for a grant of disclosure and that the burden of opposing disclosure in such a situation rests on those who would deny disclosure. Whether the showing by the opponents of disclosure is sufficient in any particular case to deny disclosure remains a matter for the discretion of the district judge, which, however, may not be exercised arbitrarily but only on plainly articulated reasons. Moreover, the district court may, and should, in the interest of fairness to all parties concerned, "include [such] protective limitations on the use of the disclosed materials," as may be appropriate under the peculiar facts of each case. It is interesting that the appellants proposed in this case that any disclosure of the grand jury materials ordered should be subject to reasonable "protective limitations."

Opinion of the Fourth Circuit (Pet., p. A13).

At the district court level, three courts have ordered disclosure of grand jury materials to a state attorney general under 4F(b). *United States v. Campbell Hardware, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,794 (D.Mass. 1979), *United States v. B.F. Goodrich Co.*, 1978-2 Trade Cases (CCH) ¶ 62,389 (N.D.Cal. 1978); *In re Montgomery Co. Real Estate Antitrust Litigation*, 452 F.Supp. 54 (D.Md. 1978). In *Goodrich* and *Campbell Hardware*, the courts determined, after briefing and argument, that the attorneys general seeking access to grand jury materials should be allowed to inspect and copy transcripts and documents. From the summary nature of the orders in the two cases, it is clear that neither court was hesitant to release grand jury materials. The *Montgomery County* case is the most complete analysis of 4F(b) yet undertaken by a

district court. It is in complete harmony with the Ninth Circuit's *B.F. Goodrich* opinion and the opinion of the Fourth Circuit below.

The petitioners place heavy reliance on two cases to support their contention that there is a split in lower court interpretation of 4F(b). In both cases it is apparent that consideration of 4F(b) was a secondary issue. The first decision is *In The Matter Of Grand Jury Which Presented Criminal Indictments 76-149 and 77-72 In The Middle District Of Pennsylvania,* 469 F. Supp. 666 (M.D.Pa. 1978). In that case, Pennsylvania moved pursuant to Rule 6(e) for access to grand jury materials, and the motion was denied. Before the State filed its motion it had already received the grand jury materials relating to six corporate defendants, as well as the testimony and record of the criminal trial of one individual defendant. The court briefly discussed 4F(b), but a careful reading of the case reveals that an application of the facts to the traditional Rule 6(e) standard was the point on which the case turned. The *Montgomery County* decision was not discussed by the Pennsylvania Court.

In *Little Rock School District v. Borden, Inc.,* 1979-2 Trade Cases (CCH) ¶ 62,809 (E.D. Ark. 1979), the State of Arkansas moved pursuant to Rule 6(e) for the disclosure of the grand jury testimony of two previously immunized witnesses. As in the Pennsylvania case just discussed, the State Attorney General was already in possession of some federal grand jury materials at the time of his motion. Again, 4F(b) was argued as a secondary line of justification for disclosure, and the court did not discuss it at length. In *Little Rock* and in the Pennsylvania *Grand Jury* case, it does not appear that the attorney general of a sovereign State was investigating or bringing an action pursuant to his *parens patriae* powers. Rather, the suits were brought by the States in a proprietary capacity.

Taken as a whole, the cases which have examined the meaning of 4F(b) in a fully developed posture have determined that Congress intended to remove the "compelling and particularized need" burden from State attorneys general. The only aberration appears in the opinion of the District Court for the Eastern District of Virginia below. The two facially inconsistent opinions, *Little Rock* and *Grand Jury,* are factually distinct and both treated 4F(b) as a secondary matter. There is no reason to conclude on the basis of decided federal cases that the case at bar presents a proper situation for the exercise of certiorari jurisdiction by this Court.

III.

THE DISTRICT COURT IS THE BEST FORUM FOR RESOLVING THIS CASE IN ITS PRESENT POSTURE.

The unindicted parties who seek review of the Fourth Circuit's decision are asking the Court to consider a legal standard which has not been applied to the facts of this case. Rather than determine the outcome of Virginia's motion in a factual vacuum, the appellate court properly remanded the case for reconsideration in light of the correct rule of law. The Supreme Court will be in a better position to consider the merits of the Fourth Circuit's rule after the rule has been tested at a practical level in the district court.

CONCLUSION

Petitioners have failed to demonstrate any compelling reason for this Court to grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Although the relationship between 4F(b) and Rule 6(e) is a question of great importance to state antitrust enforcement efforts, the courts which have ruled on the issue have done so in harmony with one another and in keeping with the grand jury secrecy

standards pronounced by this Court. For these reasons, a writ of certiorari should not issue to review the judgment of the Fourth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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UNITED STATES OF AMERICA,
COMMONWEALTH OF VIRGINIA

I hereby certify that on this 17th day of December, 1980, in accordance with Rule 28 of the Rules of the Supreme Court of the United States, three copies of the Commonwealth of Virginia's Brief in Opposition were mailed, first-class postage prepaid, to the following:

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